Supreme Court, U.S.
FILED
JUN 5 2002
OFFICE OF THE CLERK

No. 01-1636

IN THE

Supreme Court of the United States

GEOSOUTHERN ENERGY CORP.
and AMERICAN FLUORITE, INC.,

Petitioners,

v.

CHESAPEAKE OPERATING, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

JESSE R. PIERCE
CLEMENTS, O'NEILL, PIERCE,
WILSON & FULKERSON, L.L.P.
Attorneys for Respondent
1000 Louisiana, Suite 1800
Houston, Texas 77002–5009
(713) 654–7602

174283

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Respondent, Chesapeake Operating, Inc., has no parent company and the only publicly held company which owns 10% or more of its stock is Chesapeake Energy Corporation.

Respondent Chesapeake Operating, Inc. respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the decision of the Fifth Circuit Court of Appeals in this case.

REASONS FOR DENYING THE WRIT

The petition for writ of certiorari must be denied because the record and decision below do not raise the question presented. Although the district court and the court of appeals referred to the standard of review challenged by Petitioners, it was not necessary to the decisions of the lower courts.

The district court granted summary judgment on three separate claims. The challenged standard of review was mentioned in connection with only one of those claims. Even with respect to that claim, the district court did not apply the challenged standard of review in the manner suggested by Petitioners.

The standard of review challenged by Petitioners is that where "the evidentiary facts are not disputed, a court in a non-jury case may grant summary judgment if trial would not enhance its ability to draw inferences and conclusions." *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1124 (5th Cir. 1978). This standard of review has not been well developed even in the Fifth Circuit. In *Phillips Oil Co. v. OKC Corp.*, 812 F.2d 265 (5th Cir.), *cert denied*, 484 U.S. 851, 108 S. Ct. 152, 98 L. Ed. 2d 107 (1987), the Fifth Circuit noted that it had "arguably articulated" a separate standard for review of summary judgments in non-jury cases. 812 F.2d at 273 n.15. In *In re Placid Oil Co.*, 932 F.2d 394 (5th Cir. 1991), the Fifth Circuit declined to "decide definitively" whether a different summary judgment standard of review

applied in non-jury cases, because a district court has "somewhat greater discretion" in determining the weight to be accorded evidence in a non-jury case. 932 F.2d at 397. Indeed, the district court here noted that the Fifth Circuit "has suggested, but has not conclusively held, that a different summary judgment standard may apply" in a nonjury trial. Pet., App. at 15a. Thus, the dimensions of the very standard that Petitioners challenge are unclear. This case does not present a clearly defined question for this Court and, therefore, is inappropriate for review.

There is also substantial doubt as to whether the district court and the court of appeals even applied the challenged standard of review. The question before the district court was a simple one: did GeoSouthern produce evidence of the elements of a claim for reformation based on an alleged mutual mistake? As both the court of appeals and the district court recognized, the elements of a reformation claim under Texas law are: (1) an agreement as to a material term; and (2) a mutual mistake that caused the agreement to not be reflected in the written contract. Pet., App. at 5a, 16a.

In support of its motion for summary judgment, Respondent produced evidence disproving both elements of reformation. In order to avoid summary judgment, Petitioners were then obliged to produce evidence establishing the existence of a genuine issue of material fact on both elements. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1355, 89 L. Ed. 2d 538 (1986). Petitioners failed entirely to present "specific facts showing that there is a *genuine issue for trial*." *Id.*, 106 S. Ct. at 1356. Instead, Petitioners presented deposition testimony that GeoSouthern's president misunderstood the agreement, and evidence of subsequent conduct by Respondent that was inconsistent with the agreement.

The district court observed that Petitioners' evidence, if presented in a bench trial, would not cause the court to reach a different result. However, there is no indication that the district court reached this conclusion because it drew any inferences or weighed the evidence in any manner different than the court would have done under the traditional summary judgment standard. The district court and the court of appeals recognized that the agreement was unambiguous and took all of the evidence — including Petitioners' — as undisputed. Pet., App. at 6a, 17a. The district court simply held that Petitioners' evidence was not sufficient to create a genuine issue of material fact.

Contrary to Petitioners' suggestion, the district court was not called upon to weigh the evidence or make credibility determinations. As the court of appeals observed, "The above evidence is not subject to factual dispute nor could it be shaped by issues of credibility." Pet., App. at 6a. The record does not establish that the district court applied a standard other than that articulated in FED. R. CIV. P. 56 in granting summary judgment, or that the result would have been different under the two standards.

There can be no dispute that the evidence Petitioners submitted did not create a genuine issue of material fact on either element of their claim. The president of GeoSouthern's professed misunderstanding of the effect of the "not less than" language does not constitute proof of a mutual mistake. *Sun Oil Co. v. Bennett*, 125 Tex. 540, 84 S.W.2d 447 (1935). Under Texas law, a mistake by one party that is not induced by the other party does not constitute a basis for reformation. *Seymour v. American Engine & Grinding Co.*, 956 S.W.2d 49, 58 (Tex. App.—Houston [14th Dist.] 1996, writ denied); *Coronado Transmission Co. v. O'Shea*, 703 S.W.2d 731, 735-36 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

Petitioners' evidence of Respondent's subsequent conduct did not create a genuine issue of *material* fact as to whether the parties made a prior agreement different than that expressed in the executed contract, or that they made a mistake in reducing the agreement to writing. "The ultimate question in a reformation case . . . is whether a mutual mistake was made. The critical period for purposes of analysis of that question is the period during which the proposed agreement at issue was reduced to writing and reviewed prior to signing." *Phillips Oil Co.*, 812 F.2d at 275. The only evidence that is of consequence in a mutual mistake case is "objective circumstances surrounding execution" of the writing. *Williams v. Glash*, 789 S.W.2d 261, 264 (Tex. 1990). Evidence of the parties' conduct *after* a document is signed is not logically relevant because it does not make the existence of a prior agreement or a mistake in drafting more or less likely.

Petitioners presented no evidence of the required elements of their reformation claim. The evidence they presented in opposition to the motion for summary judgment was legally irrelevant, *i.e.*, was of no legal significance to the existence of either element of the reformation claim. As the court of appeals held, Petitioners simply "failed to demonstrate a genuine issue of material fact." Pet., App. at 6a.

Whether the district court "weighed" that evidence is immaterial because the nature of the evidence was such that it made no difference to the outcome of the case. There is also no indication in the record that the district court drew any inferences from any of the evidence. Therefore, it is impossible for Petitioners to demonstrate that they were injured even if the district court did apply the challenged standard of review.

This case presents, at best, a largely hypothetical issue as to the propriety of a standard of summary judgment review that probably was not applied and, if applied, certainly would not change the outcome. Therefore, there is no basis for review by this Court.

CONCLUSION

For the reasons stated, Respondent respectfully urges that the petition for writ of certiorari be denied.

Respectfully submitted,

JESSE R. PIERCE
CLEMENTS, O'NEILL, PIERCE,
WILSON & FULKERSON, L.L.P.
Attorneys for Respondent
1000 Louisiana, Suite 1800
Houston, Texas 77002–5009
(713) 654–7602